IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980
CASE NO. 80-1156

JAMES W. GIBBS,

Petitioner,

v

JOHN WELSH AND FLO-START, INC.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's Statement of the Case is accepted, except insofar as it fails to adequately set forth the jurisdictional contacts that the dealings of the parties had with the forum state (Ohio). These are enumerated in the Argument portion of this brief in opposition at pages 3-4, infra.

Petitioner's Statement of the Case does not give a complete and accurate summary of the opinion of the Court of Appeals. That opinion speaks for itself, and is found in the Petition at pages 28-47.

SUMMARY OF ARGUMENT

This Court should deny the Petition for Certiorari because it asserts no conflict among the circuits, no important legal or constitutional question and no other reason that would warrant the grant of a writ of certiorari under Supreme Court Rule 17. This case involves the application of well-established and familiar legal principles to a relatively simple set of facts. The Court of Appeals properly corrected the District Court's failure to view the facts in the proper evidentiary light. The petition for the writ in effect asks this Court merely to review this evidence. The Petitioner seeks nothing more than a second appellate hearing, and such a request is not a proper ground for the grant of the writ.

ARGUMENT

I. CERTIORARI IS NOT APPROPRIATE IN THIS CASE SINCE THE CIRCUIT COURT CORRECTLY APPLIED WELL-ESTABLISHED LEGAL STANDARDS TO THE FACTS.

In this action for breach of contract and misrepresentation brought by an Ohio resident and an Ohio corporation against a resident of Florida in the United States District Court for the Northern District of Ohio, the District Court granted a motion to dismiss for lack of jurisdiction over the person of the defendant (Petitioner herein). The Court of Appeals for the Sixth Circuit reversed and remanded, holding that the plaintiffs (Respondents herein) had made a prima facie showing that jurisdiction was present, and that the District Court erred in granting the motion to dismiss.

As developed in more detail below, the primary reason that the petition for a writ of certiorari should be denied in this case is not that the decision of the Court of

Appeals was correct, which it clearly was, but rather that it alleges no conflict between the circuits and presents no important legal or constitutional question for review. What is involved is the application by the Court of Appeals of a well-established body of law dating back to the decision of this Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945) to the facts of this particular case, which is after all but one of the many cases in which jurisdiction is asserted over a non-resident defendant under a state long-arm statute. In short, it is not the type of case contemplated by Supreme Court Rule 17.

Briefly, then, and not by way of any attempt to brief the issue on the merits, the issue presented for determination by the courts below was the presence or absence of sufficient minimum contacts with the forum state (Ohio) to confer in per-

sonam jurisdiction over the Petitioner without offending traditional notions of fair play. See International Shoe Co. v. Washington, supra. The contacts with Ohio in this case included the following:

1. The business dealings leading up to the execution of the contract between the parties which is the subject of this lawsuit were initiated by the Petitioner contacting the Respondent, Welsh, in Ohio on more than one occasion. (Both courts below found that Petitioner had purposefully availed himself of business opportunities in Ohio -- Petition, at 42 and 56).

2. The contract in question was for the purchase and sale of an invention. A prototype model of the invention was delivered and demonstrated by Petitioner to Respondents in Ohio, which demonstration itself (together with other representations made in connection therewith) constituted a portion of the misrepresentations complained of in the complaint. (Petition, at 9, 44-45).

3. A non-disclosure agreement, preliminary to the subsequent contract of sale, was signed in Akron, Ohio (Petition, at 32, 52).

4. The contract provided that in the event of disagreement it would be construed according to the law of Ohio. (Petition, at 31).

> 5. The contract required the formation of an Ohio corporation and contemplated that the product(s) derived from the invention would be developed, manufactured and marketed by such Ohio corporation in Ohio. (Petition, at 30).

The conclusion of the Court of Appeals, based on the foregoing, was as follows:

> On the entire record before us we conclude that the plaintiffs established a prima facie case of personal jurisdiction over the defendant. There were minimum contacts with Ohio, and out-of-state service under the circumstances here shown did not offend traditional notions of fair play. International Shoe Co. v. Washington, supra. Petition, at 46.

In the District Court, the jurisdictional question was disposed of upon motion to dismiss, without hearing, based upon the pleadings and affidavits of the parties. The District Court was therefore obliged to consider the evidence in the light most favorable to the party against whom the motion to dismiss was being made. The Court of Appeals held that the District Court had not viewed the evidence in such

light and erred in granting the motion. Based upon the contacts that the dealings of the parties, listed above, had with the State of Ohio, it is evident that this holding was correct and did not violate Petitioner's right to due process.

II. CERTIORARI SHOULD BE DENIED SINCE THE PETITIONER ASSERTS NO IMPORTANT OR UNRESOLVED CONSTITUTIONAL OR LEGAL ISSUES AND REQUESTS NOTHING MORE THAN A SECOND APPELLATE REVIEW.

Beyond the correctness or incorrectness of the decision of the Court of Appeals, however, the transcending question is whether or not Petitioner has set forth adequate grounds for the issuance of a writ of certiorari by this Court.

The issue in this case below was the presence or lack of in personam jurisdiction over the defendant-Petitioner. The constitutional standards applicable to such cases have been laid down by this Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945) and Hanson v. Denckla, 357

U.S. 235 (1953), and have been amplified in subsequent decisions. The Court of Appeals for the Sixth Circuit has developed and articulated its own tests for applying these constitutional standards in In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374 (6th Cir. 1968), and other cases.

In the present case, the District Court for the Northern District of Ohio applied these well-established standards to the facts, found that jurisdiction was lacking, and granted a motion to dismiss. On appeal, the Sixth Circuit determined that the District Court had misapplied the tests set forth in the cases cited above and that the District Court's findings were not supported by the record and reversed and remanded for further proceedings.

In essence, Petitioner now seeks a third opinion. He argues that because the

District Court and the Court of Appeals reached different conclusions on the same set of facts, then a fortiori Supreme Court review is required in order to resolve the conflict in the lower court decisions. It is respectfully submitted that Petitioner has confused a conflict between the circuits over an important legal or constitutional question, which would warrant review by this Court upon certiorari, and a difference of opinion between a Court of Appeals and a District Court as to the correct application of an agreed-upon standard to a particular set of facts, which clearly does not. This latter situation represents nothing more than the normal appellate process.

Petitioner admits that "[i]t is accepted that inquiry into whether the exercise of personal jurisdiction is permissible in a particular case should depend

upon the facts of each case," but feels that "when there is such a blatant discrepancy as in the positions taken by the two lower courts in the present case, clarification by this Court is warranted." (Petition, at 22). To argue that Supreme Court review is needed under such circumstances is to maintain that this Court must break the tie that is created whenever a Court of Appeals reverses a District Court. Such has never been the role of this Court, and is clearly not in accordance with the criteria set forth in Supreme Court Rule 17.

As stated in Stern & Gressman, Supreme Court Practice, §4.2 at 257-258 (5th Ed., 1978), quoting from Chief Justice Taft and Chief Justice Vinson, respectively:

> The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.

> The Supreme Court is not, and has never been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case.

Although this Court has clearly indicated that it does not "grant a certiorari to review evidence and discuss specific facts," United States v. Johnston, 268 U.S. 220, 227 (1925), that is precisely what Petitioner is asking the Court to do in this case. The conclusions of the Court of Appeals were that the findings of fact by the District Court were based upon "too narrow a reading of the record" (Petition, at 43) and were "not supported by the record" (Petition, at 45). This is a typical review by an appellate court of the conclusions reached by the finder of fact (in this case the District Judge). Nowhere in the opinion of the Court of Appeals is there any disagreement with the legal or

constitutional standards applied by the District Judge in disposing of this type of question. Rather, the Court of Appeals concluded that construing the evidence mostly strongly in favor of the party opposing the motion to dismiss, as it was required to do, the District Court erred in granting the motion. Petitioner seeks another review of the application of agreed-upon law to the facts of this case; as indicated above, such is not the role of this Court.

> The Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles. Stern & Gressman, supra, §4.18, at 298.

In this case, the Court of Appeals was indeed merely applying accepted principles, and did not even misstep in so doing.

CONCLUSION

For all of the foregoing reasons, because Petitioner has not established grounds to warrant the grant of a writ of

certiorari under Supreme Court Rule 17, the Petition should be denied.

Respectfully submitted,

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